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No. 338

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In the Supreme Court of the United States

OCTOBER TERM, 1962

CITY TRANSPORTATION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice, Washington 25, D. C.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MORTON P. GLENN,
Assistant General Counsel,

DAVID P. FINDLING,
Attorney,
National Labor Relations Board,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 433

CITY TRANSPORTATION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The Board's Decision and Order (R. 50-68, 84-89)[1] are reported at 131 NLRB 814. The opinion of the court of appeals (Pet. 21-24) is not yet officially reported.

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[1] "R." refers to matter printed in Volume I, Transcript of Record, pursuant to Rule 38 of the Court of Appeals for the Fifth Circuit. References designated "B.A." are to the Board's appendix to its brief in the court below; those designated "R.A." are to the appendix to petitioner's brief.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1962 (Pet. 21-24) and a petition for rehearing was denied on June 19, 1962 (Pet. 25). The petition for certiorari was filed on September 14, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly asserted jurisdiction over a taxicab company which derived a substantial part of its revenue from the regular transport of passengers to and from a municipal airport serving planes engaged in both interstate and intrastate travel.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. * * *
>
> * * * * *
>
> Sec. 2. When used in this Act—
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> * * * * *
>
> (6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the

United States and any State or other territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

STATEMENT

A. *The Board's Decision and Order*—The Board found that petitioner violated Section 8(a)(1) of the Act by discharging seven named employees because they participated in protected concerted activities (R. 56-64, 84-85), and by engaging in surveillance of its employees' concerted activities (R. 53-55, 63-64, 84-85). The Board ordered petitioner to cease and desist from the unfair labor practices found, and to take appropriate affirmative action to undo the effects of its illegal conduct (R. 85-89). The sole question here relates to the propriety of the Board's conclusion that it had jurisdiction over petitioner's operations. The factual basis for this conclusion is a stipulation entered into by the parties at the hearing before the Trial Examiner, which, in relevant part, stated that (R.A. 4-6): Petitioner Company had an annual gross volume of business of $2,500,000, derived from operating 380 cabs and 34

limousines; the limousines, whose revenue exceeded $100,000, were used principally to transport passengers between Dallas Love Field Airport and downtown Dallas; Love Field is a municipal airport serving airlines which have regularly scheduled flights to points outside of, as well as within, the State of Texas.[2]

On the basis of these facts, the Trial Examiner concluded that petitioner was "engaged in commerce as defined in Section 2(6) and (7) of the Act," and that it had committed "unfair labor practices affecting commerce within the meaning of" those Sections (R. 64, 65). The Trial Examiner further found that petitioner's operations satisfied the Board's discretionary standards for the exercise of its legal jurisdiction (R. 52).[3] The Board, after considering "the entire record," adopted the Examiner's findings and conclusions (R. 85).

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[2] The stipulation also recited that petitioner purchased, during the preceding year, about $25,000 worth of automobile parts, which originally came from out-of-state.

[3] The Trial Examiner cited two Board decisions: (1) *Carolina Supplies and Cement Co.*, 122 NLRB 88, 89, where the Board announced that it would "assert jurisdiction over all retail enterprises which fall within its statutory jurisdiction and *which do a gross volume of business of at least $500,000 per annum*," and added that the term "'retail enterprises' shall be deemed to include taxicab companies" (*Id.* at 89, n. 5); (2) *Jat Transportation Corp.*, 128 NLRB 780, 782, where the Board specifically applied the *Carolina Supplies* standard to a taxicab operation in New York City, after first finding that legal jurisdiction existed by virtue of the fact that the companies utilized substantial quantities of supplies and materials which came from out-of-state.

B. *The Decision of the Court of Appeals*—The court of appeals held that "the record overwhelmingly supports the Board's findings and orders" (Pet. 22). Respecting petitioner's attack on the Board's jurisdiction, the court, summarizing the factual stipulation of the parties, stated (Pet. 22):

> We think it clear that the jurisdictional position of the [Company] is not well taken, indeed that the record shows as a matter of law that there was jurisdiction. *N.L.R.B.* v. *Fort Worth Transit Co.*, 187 F. 2d 792 (5 Cir.); *N.L.R.B.* v. *El Paso-Ysleta Bus Line, Inc.*, 190 F. 2d 261 (5 Cir.).

ARGUMENT

1. Petitioner does not deny that its regular transport of passengers to and from the Dallas municipal airport is a sufficient link with interstate commerce to bring its operations within the Board's legal jurisdiction.[4] Its sole contention (Pet. 7-8) is that Board jurisdiction is defeated because the Board did not rely, or make findings based, on that factor, but instead predicated jurisdiction simply on petitioner's gross volume of business, which, by itself, is inadequate to establish that its operations affected

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[4] See *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197; *Superior Court of Washington for King County* v. *Washington ex rel Yellow Cab Service, Inc.*, 361 U.S. 373; *National Labor Relations Board* v. *Fort Worth Transit Co.*, 187 F. 2d 792 (C.A. 5); *National Labor Relations Board* v. *El Paso-Ysleta Bus Line*, 190 F. 2d 261 (C.A. 5); *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 53 (C.A. 4).

commerce within the meaning of the Act. As the court below correctly concluded, this contention is insubstantial.

Petitioner fails to distinguish between the requirements for establishing the Board's *legal* jurisdiction and the Board's *discretionary* standards for the exercise of its legal jurisdiction. To be sure, the only cases cited by the Trial Examiner were *Carolina Supplies*, 122 NLRB 88, and *Jat Transportation Corp.*, 128 NLRB 780, which apply a gross volume test (n. 3, p. 4, *supra*). But this was for the purpose of determining whether the Board's discretionary standards were met. It was apparent that the requirements for legal jurisdiction had already been satisfied, for the stipulation of the parties indicated that petitioner's limousines were substantially engaged in the business of regularly transporting passengers to and from the Dallas airport, which served interstate and connecting intrastate flights.[5] In any event, the Examiner did make a specific finding that petitioner's unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act; and the

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[5] See *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 3-4.

[6] The Board has recognized that, where the criteria utilized in its discretionary standards are not, by themselves, sufficient to establish that a business affects commerce within the meaning of the Act, there must be facts in the record to demonstrate legal jurisdiction as well as compliance with the discretionary standards. See *International Longshoremen & Warehousemen's Union (Catalina Island Sightseeing Lines)*, 121 NLRB 813, 814-815; *Carolina Supplies*, n. 3, p. 4, *supra*.

Board, in affirming the Trial Examiner, did so on the basis of the entire record (*supra*, p. 4).

2. Nor is the decision of the court below in conflict with *National Labor Relations Board* v. *Benevento*, 297 F. 2d 873 (C.A. 1), or *National Labor Relations Board* v. *Reliance Fuel Oil Corp.*, 297 F. 2d 94 (C.A. 2), cetriorari granted, 369 U.S. 883 (Pet. 8-11). In those cases, the connection between the business and interstate commerce was not as direct as here. In *Benevento* jurisdiction was asserted over a local sand and gravel company whose only tie with interstate commerce was that it sold materials to another company within the state, which, in turn, mixed them with materials obtained from out-of-state. *Reliance* involved a local fuel oil dealer who obtained supplies which originated out-of-state. Here, on the other hand, petitioner performs a service which is an essential part of the flow of interstate traffic, transportation and commerce. Thus, although we believe that a sufficient impact on commerce was shown in *Benevento* and *Reliance* to establish Board jurisdiction, it is clear that they are distinguishable from the present situation.

Indeed, in *Benevento*, the court's opinion expressly distinguishes those enterprises which, like petitioner's, are "links in a chain of interstate transactions and [where] obviously a break in the link would break the chain." 297 F. 2d at 875.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

GARY S. GREEN,
Attorney,

National Labor Relations Board.

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